United States Department of Labor
Employees' Compensation Appeals Board

FAUSTO HERNANDEZ, Appellant	)	
	)	**Docket No. 05-1478**
and	)	**Issued: October 26, 2005**
DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL, Chula Vista, CA, Employer	)	

Appearances:
Fausto Hernandez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 29, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated July 15, 2004, finding a two percent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant established that he has more than a two percent impairment of the left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On December 20, 2002 appellant, then a 37-year-old border patrol agent, filed a traumatic injury claim for an injury that date when he lost his footing on an icy road which caused him to feel a pop and sharp pain on the outside of his left knee. He submitted medical treatment notes covering the period December 23, 2002 through July 14, 2003 regarding his left knee problems and ability to work. In a July 14, 2003 report, Dr. Thomas W. Harris, an attending orthopedic

surgeon, noted appellant's complaint of left knee pain and his return to full-duty work without difficulties. On physical examination, he reported active range of motion from 0 degrees to 135 degrees on both the left and right, flexion of 5/5 on the right and left, extension of 5/5 on the right and left, ankle jerks of 2+ on the right and left and knee jerks of 2+ on the right and left. Dr. Harris stated that the McMurray, pivot shift, Lachman and anterior drawer test results were negative. Both varus and valgus stress were stable. Dr. Harris noted that no x-ray had been taken on the date of examination, but he reviewed a December 26, 2002 magnetic resonance imaging (MRI) scan report which found moderate-sized joint effusion with soft tissue edema that was laterally pronounced and no evidence of ligamentous injury or meniscal tear. He also reviewed an operative report which described the left knee arthroscopy with anterior cruciate ligament (ACL) revascularization, a partial lateral meniscectomy and an excision of synovial plica he performed on appellant on February 4, 2003. Dr. Harris diagnosed status post ACL revascularization and partial lateral meniscectomy. He opined that appellant had reached permanent and stationary status on July 14, 2003 as a result of the December 20, 2003 employment injury. Dr. Harris stated that appellant had subjective factors of disability consistent with minimal pain that caused an annoyance. He noted that the pain increased to a minimal to slight level with going up or down a hill and it did not prevent appellant from performing his usual and customary job. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) 546, Table-17-33, Dr. Harris concluded that appellant had a two percent impairment of the left lower extremity secondary to a partial lateral meniscectomy.

The Office accepted appellant's claim for a left knee strain, left lateral meniscus tear, left ACL tear. The Office also authorized Dr. Harris's February 4, 2003 left knee arthroscopy with ACL revascularization, partial lateral meniscectomy and excision of synovial plica.

On August 8, 2003 appellant filed a claim for a schedule award. He submitted a July 14, 2003 amended report in which Dr. Harris found that, in addition to having a two percent impairment of the left lower extremity, appellant had a seven percent impairment of the left lower extremity secondary to ACL laxity and repair based on the A.M.A., *Guides* 546, Table 17-33. Dr. Harris used the Combined Values Chart, A.M.A., *Guides* 604, to determine that appellant had a nine percent impairment of the left lower extremity.

On August 28, 2003 an Office medical adviser reviewed the case record. He found that appellant was status post left arthroscopy with arthroscopic revascularization of the ACL, partial lateral meniscectomy and excision of the synovial plica. Utilizing the A.M.A, *Guides* 546, Table 17-33, the Office medical adviser found that appellant had a two percent impairment of the left lower extremity based on the partial lateral meniscectomy. He stated that appellant reached maximum medical improvement on July 14, 2003 as found by Dr. Harris. The Office medical adviser noted that Dr. Harris found that appellant was entitled to a schedule award for a seven percent impairment for his left lower extremity secondary to ACL laxity and repair. However, the medical adviser stated that appellant did not have any evidence of ACL insufficiency based on a negative pivot shift, Lachman and anterior drawer maneuvers test results. He concluded that there was no clinical evidence of laxity of appellant's ACL.

By decision dated January 5, 2004, the Office granted appellant a schedule award for a two percent impairment of the left lower extremity.

Appellant submitted a March 3, 2004 report, in which Dr. Harris reviewed the report of the Office medical adviser. Dr. Harris agreed with the Office medical adviser's finding that appellant did not have an ACL insufficiency. However, he reiterated that appellant had a two percent impairment secondary to a lateral meniscectomy and a five percent impairment for a history of direct trauma, complaints of patellafemoral pain and crepitation on physical examination based on the A.M.A., *Guides* at page 544.[1] He concluded that, based on the Combined Values Chart, appellant had a seven percent impairment of the left lower extremity.

By letter dated March 18, 2004, appellant requested reconsideration. In a May 28, 2004 decision, the Office denied modification of the January 5, 2004 decision. It remanded the case for a determination as to whether he had more than a two percent impairment of the left lower extremity.

On June 16, 2004 the Office medical adviser reviewed the medical evidence of record. He again found that appellant was entitled to a schedule award for a two percent impairment of the left lower extremity based on the A.M.A., *Guides* 546, Table 17-33. The Office medical adviser stated that, although appellant was noted to have crepitation on examination, there was no evidence of any obvious patellafemoral irritability and, as such, it did not appear that this crepitation was symptomatic. He noted that the presence of crepitation and the absence of correlating clinical symptoms did not warrant any impairment rating based on the A.M.A., *Guides*. The Office medical adviser concluded that appellant was not entitled to any additional impairment due to residual crepitus.

By decision dated July 15, 2004, the Office found that appellant had no more than a two percent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act, nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

[1] The footnote to the text of the A.M.A., *Guides* 544, Table 17-31 provides: "In an individual with a history of direct trauma, the complaints of patellofemoral pain and crepitation on physical examination, but without joint narrowing on x-rays, a two percent whole person or five percent lower extremity impairment is given."

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from his physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[6]

Section 8123(a) of the Act provides: "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[7]

ANALYSIS

The Office accepted that appellant's left knee strain, left lateral meniscus tear and left ACL tear were work related and granted him a schedule award for two percent impairment of the left leg. Appellant requested an additional schedule award. He submitted a March 3, 2004 report from Dr. Harris, who agreed with the Office medical adviser's finding that appellant did not have any ACL insufficiency. Dr. Harris found that appellant has a two percent impairment secondary to a lateral meniscectomy and a five percent impairment for a history of direct trauma, complaints of patellafemoral pain and crepitation on physical examination utilizing the A.M.A., *Guides* 544, Table 17-31. Based on the Combined Values Chart, Dr. Harris concluded that appellant has a seven percent impairment of the left lower extremity.

An Office medical adviser disagreed with the impairment rating of Dr. Harris and utilized the A.M.A., *Guides* 546, Table 17-33 to find that appellant had a two percent impairment of the left lower extremity. He stated that, although he was noted to have crepitation on examination, there was no evidence of any obvious patellafemoral irritability and, as such, it did not appear that the diagnosed crepitation was symptomatic. The presence of crepitation in the absence of correlating clinical symptoms did not warrant any impairment based on the A.M.A., *Guides*. The Office medical adviser concluded that appellant was not entitled to any additional impairment due to residual crepitus.

The medical evidence currently of record found that appellant had a seven percent impairment of the left lower extremity due to a lateral meniscectomy and a history of direct trauma, complaints of patellafemoral pain and crepitation on physical examination based on the report of Dr. Harris. The Office medical adviser found that appellant had a two percent impairment of the left lower extremity due to a lateral meniscectomy. In light of the different impairment ratings between Dr. Harris, appellant's attending physician, and the Office medical

[6] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[7] *Richard L. Rhodes*, 50 ECAB 259 (1999); *Noah Ooten*, 50 ECAB 283 (1999); *Rosita Mahana* (*Wayne Mahana*), 50 ECAB 331 (1999); *Richard Coonradt*, 50 ECAB 360 (1999); *Gwendolyn Merriweather*, 50 ECAB 411 (1999); *Marsha R. Tison*, 50 ECAB 535 (1999).

adviser, the Board finds there is an unresolved conflict in the medical opinion evidence regarding the extent of impairment to his left lower extremity.

The Board will remand the case to the Office for appropriate development of the medical record to determine the extent of appellant's left lower extremity in accordance with the A.M.A., *Guides.* On remand the Office should refer appellant to an appropriate Board-certified physician to determine the extent of his impairment as a result of the accepted December 20, 2002 employment injury. Following this and any other further development as deemed necessary, the Office shall issue an appropriate decision on appellant's schedule award claim.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the issue of whether appellant has established that he has more than a two percent impairment of the left lower leg due to an unresolved conflict of medical opinion evidence regarding the extent of his employment-related permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 26, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board